EX PARTE OR LATE FILED

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
FEB 18 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Access Charge Reform	)	**CC Docket No. 96-262**
	)	
Price Cap Performance Review for Local Exchange Carriers	)	**CC Docket No. 94-1**
	)	
Transport Rate Structure and Pricing	)	**CC Docket No. 91-213**
	)	
Usage of the Public Switched Network by Information Service and Internet Access Providers	)	**CC Docket No. 96-263**

To: The Commission

REPLY COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE

Wayne V. Black
C. Douglas Jarrett
Susan M. Hafeli
Paula Deza
KELLER AND HECKMAN LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Dated: **February 14, 1997**

No. of Copies rec'd 0+16
List ABCDE

TABLE OF CONTENTS

EXECUTIVE SUMMARY i

I. DEREGULATION AND GUARANTEED RECOVERY ARE FUNDAMENTALLY INCONSISTENT 2

II. ILEC ARGUMENTS ABOUT THE "SOCIAL COMPACT" AND "UNCONSTITUTIONAL TAKINGS" MISCHARACTERIZE THE THE REGULATORY FRAMEWORK 4

III. ONLY THE PRESCRIPTIVE APPROACH COMPORTS WITH THE 1996 ACT 9

IV. THE RECORD DEMONSTRATES THAT ILECS WILL NOT VOLUNTARILY ESTABLISH RATES BASED ON FORWARD-LOOKING ECONOMIC COSTS 12

V. USING THE SLC AS AN ILEC COST RECOVERY MECHANISM THWARTS THE PROMISE AND EXPECTATIONS OF THE 1996 ACT 15

VI. COMPREHENSIVE REFORM, NOT ILEC PRICING FLEXIBILITY, SHOULD BE THE GOAL OF THIS PROCEEDING 17

EXECUTIVE SUMMARY

The immediate objective of access charge reform must be to achieve the rate levels, and then the structures, that a competitive market would produce. Economically-efficient rates and rational cost structures, in turn, will foster the substantial competition that warrants deregulation.

The ILECs seek virtually unrestrained pricing freedom at the same time they seek the maximum benefits obtainable under traditional rate of return regulation. Their demonstrated hostility to TELRIC/TSLRIC demonstrates that, if granted pricing freedom they will not price access services in a manner consistent with forward-looking economic costs. Consequently, for the Commission to achieve its stated goals, it must reject a market-based approach and adopt the prescriptive approach.

ILEC arguments against the prescriptive approach cost fail to acknowledge that the adoption of price cap regulation fundamentally altered the "social compact" by breaking the link between rates and earnings. When LEC earnings opportunities are viewed in totality, as they must be under constitutional law, there is no "taking."

As it undertakes the complex task of access reform, the Commission must balance both the "pro-competitive" and "deregulatory" aspects of the 1996 Act's policy framework. In the absence of a meaningful competitive alternative for ILEC exchange access service, the Commission must take immediate steps to bring ILECs' excessive access rates down to just and reasonable levels. Further delay impedes achievement of the Commission's stated goals and contravenes the statutory obligation that these rates be subsidy-free.

BEFORE THE

Reply Comments of API

Federal Communications Commission

February 14, 1997

WASHINGTON, D.C. 20554

RECEIVED

FEB 18 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Access Charge Reform	)	**CC Docket No. 96-262**
	)	
Price Cap Performance Review for Local Exchange Carriers	)	**CC Docket No. 94-1**
	)	
Transport Rate Structure and Pricing	)	**CC Docket No. 91-213**
	)	
Usage of the Public Switched Network by Information Service and Internet Access Providers	)	**CC Docket No. 96-263**

To: The Commission

REPLY COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute (API), by its undersigned attorneys, hereby respectfully submits these Reply Comments in response to the Notice of Proposed Rulemaking released by the Federal Communications Commission (the Commission) on

December 24, 1996 in the above-captioned proceeding.[1] API urges the Commission to reject a market-based approach to access charge reform and, instead, adopt the prescriptive approach to access charge reform and take immediate steps to reduce excessive rates by reinitializating price cap indices, reducing authorized rates of return, and substantially increasing the price cap productivity offset, or X Factor.

I. DEREGULATION AND GUARANTEED RECOVERY ARE FUNDAMENTALLY INCONSISTENT

Responsive to: Section IV: Approaches to Access Reform and Deregulation
Section V: Market-Based Approach to Access Reform

The incumbent LECs' comments advance wholly inconsistent positions. If their positions are adopted, the ILECs will enjoy virtually unrestrained pricing freedom at the same time they enjoy the maximum benefits obtainable under traditional rate of return regulation.[2] Allowing ILECs to "have it both ways" guarantees continuing inflated rates, anti-competitive pricing, and the obstruction of efficient and viable competition.

The Commission must acknowledge and address the fundamental inconsistency of the ILECs' positions. The Commission must also acknowledge and address the fact that

---

1 *Access Charge Reform,* CC Docket No. 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, FCC 96-488 (adopted December 23, 1996) ("Notice").

2 *See, e.g.,* GTE Comments at 2 ("True reform requires substantial deregulation . . . [t]rue reform also necessitates establishment of a competitively neutral mechanism for recovering costs engendered by past, present, and future regulatory policies.").

under the market-based approach, the ILECs' positions create an irreconcilable conflict between its identified goals, which include: (1) "end[ing] up with" rate levels and structures that a competitive market for access services would produce; (2) fostering the development of substantial competition for interstate access services; and (3) deregulating incumbent LEC exchange access either "in the presence of substantial competition" or "as competition develops in the local exchange and exchange access market."[3] Premature ILEC deregulation, which the ILECs vigorously advocate, ensures that both access rates based on economic costs and "substantial competition" for interstate access services will remain mere goals.[4]

The immediate objective of access charge reform must be to achieve the rate levels, and then the rate structures, that a competitive market would produce. Those rate levels and structures, in turn, will foster the substantial competition that warrants deregulation.

Rate levels that emulate competitive markets depend upon forward-looking economic costing.[5] Because the ILECs' comments establish that they will not price in this manner if permitted pricing freedoms, the Commission must reject the proposed

---

[3] Notice at ¶¶ 13, 14, and 149.

[4] The Commission's proposal to use "triggers" and "phases" with respect to ILEC regulatory relief is a recognition of the need to proceed sequentially.

[5] Indeed, even some ILECs are willing to concede this point. *See, e.g.,* Comments of Southwestern Bell Telephone Company at 47-48.

market-based approach to access charge reform.[6] Instead, it must *prescribe* rates and take other action to drive access charges to economic cost, in conformance with its statutory duty to establish "just and reasonable" rates that are subsidy-free.[7] It must not be dissuaded from this approach by the ILECs' "takings" allegations.[8]

II. ILEC ARGUMENTS ABOUT THE "SOCIAL COMPACT" AND "UNCONSTITUTIONAL TAKINGS" MISCHARACTERIZE THE REGULATORY FRAMEWORK

Responsive to: Section VII: Transition Issues

A number of ILECs contend that setting rates for interstate access services based on forward-looking economic costs breaks "the social compact" and effects an "unconstitutional taking."[9] These arguments suggest that the implementation of price cap regulation granted ILECs pricing and earnings flexibility without imposing any corresponding duty on the ILECs to respond appropriately to competitive pressures, whether those pressures originated from Commission rules or marketplace developments. It is this one-sided representation that appears to serve as the foundation for the ILECs'

---

[6] The ILECs' hostility towards forward-looking economic costing is addressed in Section IV, below.

[7] 47 U.S.C. §§ 201, 202, 254.

[8] The "takings" argument is yet another barrier erected in the path of those who would open local telecommunications markets and secure the interconnection rights accorded competitors under the 1996 Act.

[9] *See, e.g.*, GTE Comments at 79-85; Comments of Pacific Telesis Group at 36-37; Joint Comments of Bell Atlantic/NYNEX at 17-23; U.S. West Comments at 2-10.

claims of entitlement. If those claims are accepted and interstate access rates are allowed to reflect the ILECs' embedded costs, then IXCs and market entrants will continue to pay rates that subsidize their potential competitors and end users will continue to pay inflated fees.

If any social compact is deemed to exist between regulators and price cap LECs, it is not one which guarantees ILEC revenue streams or recovery of both historical and forward-looking costs. Price cap regulation of interstate access services, in place since 1990, breaks the link between ILEC rates and earnings.[10] At the same time, price cap regulation offers significant benefits to incumbent LECs because "flexibilities within the price cap framework are forms of regulatory relief that are intended to allow the LECs to respond to emerging competition."[11] An incumbent that operates under price caps can be said to have rejected any prior "compact" that may have been applicable in a monopoly

---

[10] As the Commission recently recognized, "price cap regulation severs the direct link between regulated costs and prices. . . ." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (rel. July 18, 1996) at para. 136 (citation omitted).

[11] The Commission also recognized that these flexibilities also allow efficient competition to emerge in some cases. *Price Cap Performance Review for Local Exchange Carriers; Treatment of Operator Services Under Price Cap Regulation; Revisions to Price Cap Rules for AT&T,* CC Docket No. 94-1, CC Docket No. 93-124, CC Docket No. 93-197, Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1, Further Notice of Proposed Rulemaking in CC Docket No. 93-124, and Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197, 11 FCC Rcd 858 (1995)*(Price Cap Second FNPRM)* at para. 106.

environment. Instead, in exchange for its greater flexibility, the incumbent agrees to share with consumers, through rate reductions, some measure of the entrepreneurial profit that the firm might generate by lowering its costs. By now asserting that "price cap regulation is an extension of an enduring compact with the regulator that the regulated company will have an opportunity to recover its actual costs," the incumbents turn price cap regulation on its head.[12]

The "takings" arguments appear to build on this notion of a social compact by asserting "the right of regulated companies to the opportunity to earn a reasonable rate or [sic] return so long as they are regulated" and the right to recover embedded, or historical, costs in addition to forward-looking economic costs.[13]

As MCI points out, requiring incumbent LECs to set their access charges at economic cost will not deny them the opportunity to earn reasonable rate of return on a going-forward basis. "To the contrary, because economic cost includes the cost of capital and a reasonable share of overhead costs, setting access charges at economic cost actually guarantees incumbent LECs an ordinary and reasonable profit on their access services so long as they invest and operate efficiently."[14] There is no "taking" in this context.

A discussion of the merits of the incumbents' constitutional arguments with

---

[12] Joint Comments of Bell Atlantic/NYNEX at 16. Bell Atlantic/NYNEX offer no citation in support of this alleged "compact."

[13] U.S. West Comments at 6.

[14] MCI Comments at 30.

respect to the recovery of embedded costs is beyond the scope of these reply comments. However, the parties' initial comments reveal several fundamental deficiencies with respect to the ILECs' argument.

First, the case law cited by the ILECs pertains to utilities subject to traditional rate of return regulation. Traditional rate of return regulation was replaced in 1990 for these ILECs with price-cap regulation, which explicitly severs the link between rates and earnings. These cases thus appear inapposite with respect to determining that which constitutes a "confiscatory taking" for utilities subject to price-cap regulation.

Second, contrary to the ILECs' implications, historical cost is not the only constitutionally acceptable method of fixing utility rates.[15] Rather, the validity of any particular regulatory method turns on the "total effect" of the rate order on the utility, because "the impact of certain rates can only be evaluated in the context of the system under which they are imposed."[16] As a number of parties demonstrate, the current system allows price-cap ILECs substantial opportunities to "exploit [their] embedded base of telecommunications network resources so as to expand [their] markets and in so

---

[15] "The adoption of a single theory of valuation as a constitutional requirement would be inconsistent with the view of the Constitution this Court has taken since *Hope Natural Gas, supra*. . . The designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors." *Duquesne Light Co. v. Barasch, 109 S.Ct. 609,* 620 (1989).

[16] Id. at 619.

doing expand [their] revenues and profit levels."[17] These same parties demonstrate that the investment community does not perceive the current system, when viewed as a whole, as imperiling their investments in the ILECs. These investors recognize, as should the Commission, that the "total effect" on the ILECs is not confiscatory.

To the extent the Commission allows recovery, it must be limited to investments that the ILEC demonstrates were prudently made in response to demands for basic service that pre-date the 1990 adoption of price cap regulation.[18] This standard would exclude substantial ILEC investment, since fully 60 percent of all ILEC net investment on the books as of the end of 1995 had been acquired since the beginning of 1990, according to a study performed by Economics and Technology, Inc. (ETI) and submitted by AT&T in CC Docket No. 96-98 in May, 1996.[19] This standard would also exclude investments made for strategic or competitive reasons, as well as imprudent acquisitions, including the premature accumulation of excess switching and transmission capacity. Moreover, given that the price cap LECs have continued to earn amounts in excess of

---

[17] Comments of Ad Hoc Telecommunications Users Committee at 59-60. *See also* AT&T Comments at 32-39; MCI Comments at 30.

[18] The "historical cost" rule is also referred to as the "prudent investment" rule. "Under the prudent investment rule, the utility is compensated for all prudent investments at their actual cost when made (their 'historical' cost)." *Duquesne* at 616. Prudence is evaluated as of the date of the investment decision, as opposed to the date of the review. It is not assumed.

[19] Id at 64, citing *Analysis of Incumbent LEC Embedded Investments: An Empirical Perspective on the "Gap" Between Historic Costs and Forward-Looking TSLRIC,* filed as part of AT&T's Reply Comments in CC Docket No. 96-98, May 30, 1996.

their authorized interstate rate of return, any recovery that the Commission authorizes should be reduced by an amount that corresponds to cumulative overearnings. Finally, because recovery will be limited to a sum certain, any recovery mechanism must expire after receipt of that sum.

III. ONLY THE PRESCRIPTIVE APPROACH COMPORTS WITH THE 1996 ACT

Responsive to: Section IV: Approaches to Access Reform and Deregulation
Section V: Market-Based Approach to Access Reform
Section VI: Prescriptive Approach to Access Reform

The ILECs' support for the market-based approach appears to be grounded in an interpretation of the 1996 Act that would have "competition . . . replace regulation as the preferred method of keeping prices reasonable."[20] These parties twist references to the "pro-competitive, deregulatory national policy framework" established by the 1996 Act into a Congressional directive that the Commission harness "competitive" forces for "de-regulatory" results. This mischaracterization, like the ILECs' endless refrains of competitive inequalities, ignores the multitude of statutory provisions and safeguards designed to, *inter alia,* restrain potential market abuses by incumbent LECs, which today enjoy enormous competitive advantages. The Commission must not acquiesce to the ILECs' mischaracterization of the Act.

While the "pro-competitive" provisions of the 1996 Act benefit all

---

[20] U.S. West Comments at 15-16.

telecommunications providers, Congress did not grant the Commission *carte blanche* to deregulate the ILECs. Rather, the pro-competitive provisions of the Act are intended to promote market entry and the interests of users as the telecommunications industry transitions to a competitive state. The Act's "deregulatory" provisions contemplate both regulatory freedoms for ILECs operating in sufficiently competitive markets, so long as that relief is consistent with the public interest, as well as the eventual elimination of the modest regulatory oversight currently associated with non-dominant carriers. The Commission's task under the Act is to find that point at which the "pro-competitive" and "deregulatory" interests are balanced.

The 1996 Act promotes competitive entry by establishing an asymmetrical regulatory scheme. Incumbent LECs, for example, are subject to statutory interconnection duties that are inapplicable to other telecommunications carriers.[21] Significantly, for the purposes of this proceeding, the 1996 Act establishes pricing standards for ILEC services, while it leaves market entrants free to price as they will. The Act expressly obligates ILECs to provide wholesale rates for their retail services and nondiscriminatory cost-based rates (which, pursuant to the Act, may include a reasonable profit) for interconnection and unbundled network elements.[22] That disparity is furthered evidenced by the preferential treatment accorded telecommunications carriers other than

---

21 *See, e.g.,* 47 U.S.C. § 251(c).

22 47 U.S.C. §§ 251(c)(4)(A), 252(d)(1).

incumbent LECs. Incumbent LECs, for example, are expressly excluded from the definition of "telecommunications carrier" and therefore do not enjoy the "pole attachment" rights established in Section 224.[23]

Working in tandem with the Act's "pro-competitive" provisions are the "deregulatory" provisions that contemplate regulatory freedoms for incumbent LECs when the Commission determines, in part, that such relief comports with the public interest. The interrelationship between these provisions is demonstrated by the fact that the Commission may not grant regulatory relief, including deregulation, without considering the competitive impact of such relief. In evaluating public interest considerations for regulatory forbearance, for example, the Commission "shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[24]

As it undertakes the enormously-complicated task of overhauling the interstate access charge regime, the Commission should be guided by these, and related, statutory provisions and safeguards. The approach the Commission adopts must recognize, as does the 1996 Act, the enormous competitive advantages that incumbent LECs enjoy. Just as Congress established costing and pricing standards to govern interconnection agreements,

---

[23] 47 U.S.C. § 224(a)(5).

[24] 47 U.S.C. § 160(b).

the Commission must adopt the prescriptive approach to ensure that analogous costing and pricing standards govern interstate access charges.

Until the ILECs' competitive advantages are substantially eliminated by the development of actual facilities-based competition, reliance on nascent "marketplace forces" to regulate rates fails to strike the proper balance under the Act: while it is "deregulatory" it is not "pro-competitive." Only the prescriptive approach guarantees that rates will move towards economic cost, to the benefit of both competitors and end users.

IV. THE RECORD DEMONSTRATES THAT ILECS WILL NOT VOLUNTARILY ESTABLISH RATES BASED ON FORWARD-LOOKING ECONOMIC COSTS

Responsive to: Section IV: Approaches to Access Reform and Deregulation
Section V: Market-Based Approach to Access Reform

The Commission proposes two mechanisms for driving prices for ILEC interstate access services towards its goal of "forward-looking economic costs": either marketplace forces or its own rules.[25] As a general rule, incumbent LECs favor a market-based approach, while interexchange carriers and end-user representatives favor the latter approach, under which the Commission prescribes rates.[26]

---

[25] Notice at ¶¶ 14, 16.

[26] It should be noted that some ILECs contend that a market-based approach is unacceptable as unnecessarily restrictive. GTE, for example, urges deregulation, characterizing both the market-based and prescriptive approaches to access charge reform as "simply too timid and too regulatory," and the proposed triggers for regulatory flexibility "unlawful and unnecessary." GTE Comments at 2, 45. U.S. West "believes

If the Commission is committed to driving access rates to economically-efficient levels, as it asserts, then it must adopt the prescriptive approach. The record offers the Commission no basis to conclude that the market-based approach will achieve this goal when both the comments and actions of the incumbent LECs demonstrate their profound opposition to the use of forward-looking costs as a basis for pricing any telecommunications services they offer.

Despite their use of "long-run incremental costing" for intrastate services subject to nascent competition, incumbent LECs obtained a partial stay of the pricing provisions of the Commission's historic *Local Competition Order,* including the "Total Element Long Run Incremental Cost" (TELRIC) methodology adopted in that Order.[27] The challenges continue at the state level, as incumbent LECs appeal state-arbitrated interconnection agreements that include TELRIC or TELRIC-like rates.[28]

Similarly, the incumbents' comments reflect a fundamental unwillingness to price access services using forward-looking economic costs. GTE, U.S. West, and Bell South

---

[the market-based approach] may fairly be characterized as 'too little, too late." U.S. West Comments at 28.

[27] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499(1996)(*Local Competition Order)*, Order on Reconsideration, CC Docket No. 96-98, 11 FCC Rcd 13042 (1996)(*Local Competition Reconsideration Order), petition for review pending and partial stay granted, sub nom.* Iowa Utilities Board et. al v. FCC, No. 96-3321 and consolidated cases (8th Cir. Nov. 1, 1996). State regulators joined incumbent LECs in appealing the Commission's *Local Competition Order.*

[28] GTE, for example, has appealed interconnection awards in at least 15 states.

adamantly oppose TELRIC and "Total Service Long Run Incremental Cost" (TSLRIC) methodologies.[29] Bell Atlantic/NYNEX contend that "it would be an unconstitutional taking for the Commission to adopt its prescriptive approach and reinitialize rates to match" TSLRIC or TELRIC.[30] Pacific Telesis and the United States Telephone Association assert that "LECs are entitled to receive all of their economic costs, both forward looking and historic."[31]

These comments and actions demonstrate the ILECs' pervasive hostility to rates based solely on forward-looking economic costs, even when those costs include a reasonable profit component. Given this demonstrated hostility, the Commission has no basis to conclude that incumbent LECs will voluntarily price access services at levels approximating forward-looking economic costs. Indeed, to draw such a conclusion, the Commission would be obligated to *disregard* substantial record evidence.[32] The

---

[29] GTE Comments at fn. 7 ("No provider in a competitive market could price at TELRIC and recover sufficient costs to survive."); U.S. West Comments at 15 ("Adopting TELRIC in a vacuum is simply not a lawful option."); Bell South Comments at 45-46 ("[T]here are fundamental problems with using TSLRIC or TELRIC as the measure of LEC 'costs.'").

[30] Joint Comments of Bell Atlantic/NYNEX at 16-17.

[31] Comments of Pacific Telesis Group at 45; Comments of United States Telephone Association (USTA) at 68 et. seq.

[32] The record also fails to support the Commission's assumption that ILECs will exhibit sensitivity to market signals should the Commission adopt a market-based approach. Bell Atlantic/NYNEX, for example, profess to be "unaware of any empirical evidence that suggests that the price of terminating access is priced above market levels and has acted as a bottleneck service." Joint Comments of Bell Atlantic/NYNEX at 41-42.

prescriptive approach offers the only guarantee that interstate switched access rates will move towards forward-looking economic costs.

V. USING THE SLC AS AN ILEC COST RECOVERY MECHANISM THWARTS THE PROMISE AND EXPECTATIONS OF THE 1996 ACT

Responsive to: Section III(B): Rate Structure Modifications: Common Line

The prospect of consumer benefit must not be lost as the Commission struggles with reforming interstate access charges. Though a year has passed since enactment of the Telecommunications Act of 1996, end users have yet to realize anticipated rate savings.[33] At this stage of access charge reform, then, the Commission should be sensitive to shifting costs to end users through manipulation of subscriber line charges (SLCs). API urges the Commission to consider carefully the position that the SLC be adjusted upward to provide revenue replacement for ILECs.[34]

In the context of ISDN services, the comments overwhelmingly support the assessment of the SLC on a per-facility basis. As Ameritech observes, "[c]harging SLCs

---

[33] According to former Representative Jack Fields, "[Congress] is decompartmentalizing segments of the telecommunications industry, opening the floodgates of competition through deregulation, and most importantly, giving consumers choice . . . and from these choices, the benefits of competition flow to all of us as consumers - new and better technologies, new applications for existing technologies, and *most importantly . . . lower consumer price.*" 142 Cong.Rec. H1149 (Feb. 1, 1996) (statement of Rep. Fields) (emphasis added).

[34] U.S. West, for example, asserts that "[a]s the access charges imposed on IXCs come down, the revenues lost must be replaced by charges on end users." U.S. West Comments at 77.

on a derived channel basis would substantially over-recover loop costs from ISDN subscribers."[35] In addition to cost arguments, CompTel points out that the imposition of SLCs on a derived-channel basis creates an artificial incentive for ILECs to emphasize customer premises equipment over network solutions, and so could unintentionally promote inefficient network design.[36] Given the broad-based support evidenced in the comments, the Commission should adopt the per-facility approach.[37]

---

[35] Ameritech Comments at 13.

[36] Comments of Competitive Telecommunications Association at 29-30. CompTel notes that, to avoid the "derived-channel" assessment, the multiplexer could be placed on the customer's premises as CPE, rather than on the loop as part of the ILECs' outside plant.

[37] *See e.g.,* BellSouth Comments at 70; Pacific Telesis Group at 64-65; Comments of Sprint Corporation at 18.

VI. COMPREHENSIVE REFORM, NOT ILEC PRICING FLEXIBILITY, SHOULD BE THE GOAL OF THIS PROCEEDING

Responsive to Section IV(B): Approaches to Access Reform and Deregulation: The Goal - Deregulation in the Presence of Substantial Competition

While the commenting parties may not agree on many points, they are in virtual unanimity concerning the need to reform the interstate access charge regime. There is wide support for the Commission's observations that current rate structures are significantly distorted and rates are excessive. There is also widespread recognition of the interrelationship between various proceedings and the need to reform the jurisdictional separations process.

The Commission must take as its starting point in this proceeding the recognition that there is no meaningful competitive alternative to ILEC exchange access service. Unbundled network elements are not a viable substitute for switched access services. As CompTel notes, "[n]etwork elements that are fully substitutable for access services are not available today, and recent experience makes clear that, without active regulatory intervention, they will not become available."[39] Even if those elements were available, their viability as a substitute depends upon customer willingness to obtain integrated local and interexchange service from a competitive LEC. That willingness, in turn, depends upon resolution of operational issues. For example, until long-term number portability is

---

[39] Comments of the Competitive Telecommunications Association at 4.

implemented, large corporate users will be reluctant to switch local carriers.[40]

Excessive rates, in conjunction with the absence of meaningful competitive alternatives to ILEC exchange access services, demands that the Commission take steps immediately to bring the price cap LECs' access rates towards "just and reasonable" levels. Those initial steps should include: (1) a reinitialization of price cap indices;[41] (2) a reduction in authorized rates of return; and (3) a substantial increase to the price cap productivity offset, or X-Factor, which should be calculated on an interstate basis only. These long-overdue corrections should eliminate significant fat from current access rates, thereby easing the Commission's task as it establishes economically-efficient costs.

After implementing the price cap corrections identified above, the Commission must resist the temptation to defer further access charge reform pending an overhaul of the judicial separations process. While it is important to re-examine the judicial separations process to establish equitable allocations, that proceeding should not take

---

[40] American Communications Services, Inc. (ACSI) alleges that BellSouth has failed to implement service provider number portability as ordered by ACSI, and, "[a]s a result, [ACSI's] customers could not receive any incoming calls on their lines....ACSI cannot market its local exchange services if. . . there is no assurance that customers will receive incoming calls through number portability." *American Communications Services, Inc. v. BellSouth Telecommunications, Inc.*, FCC File No. E-97-09 at ¶¶ 13, 15.

[41] AT&T's proposal to focus on four key carrier access elements during the reinitialization process should satisfy Commission concerns regarding administrative burdens. AT&T Comments at 23. Alternatively, given the functional equivalency of access elements and network elements, the Commission could "'borrow' state commission pricing determinations to determine appropriate access price cap adjustments." AT&T Comments at 26. *See also* MCI Comments at 18-28.

precedence over further reform of the interstate access charge system. Indeed, that proceeding cannot take precedence, since access rates that retain implicit or explicit subsidy elements contravene the statutory dictates of Section 254 of the 1996 Act.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully urges the Federal Communications Commission to maintain and further the pro-competitive deregulatory goals enunciated in the Telecommunications Act of 1996 by adopting a prescriptive approach to access charge reform, by implementing three long-overdue price cap corrections that are critical to reducing excessive rates, and by taking other action consistent with the views expressed herein.

Respectfully submitted,

AMERICAN PETROLEUM INSTITUTE

Wayne V. Black
C. Douglas Jarrett
Susan M. Hafeli
Paula Deza
KELLER AND HECKMAN LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Dated: February 14, 1997